# National Labor Relations Board Weekly Summary of NLRB Cases

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Press Release (R-2577): NLRB Announces Pilot ADR Program for Settling Unfair Labor Practice Cases Pending Before the Board

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Carpenters Locals 1506, 209, and 743 (31-CC-2121, et al.; 345 NLRB No. 112)
Los Angeles, CA Dec. 7, 2005. Members Liebman and Schaumber, citing *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), and *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426 (2002), denied Charging Party Marriott Warner Center Woodland Hills' request that the Board accept its late-filed reply brief based on excusable neglect. They found that the Charging Party's asserted reason for the lateness—that it "mis-calendared" the due date through "inadvertent oversight"—did not rise to the level of excusable neglect. Chairman Battista dissented. [HTML] [PDF]

Chairman Battista would accept a tardy brief where: (1) all parties have been contacted by the tardy party, and all of them affirmatively consent to the receipt of the tardy document; and (2) the Board has no valid reason of its own for rejecting the tardy document. In his view, the Act encourages parties to cooperate and reach accord. He sees no reason why the Board should reject an all-party agreement to accept a tardy brief, provided that fundamental Board interests are not undermined. Chairman Battista explained: "Accordingly, I would permit the Charging Party here to proceed promptly under step one above. Absent an all-party accord, I would reject the brief. With all-party accord, I would accept the brief. In this latter regard, I do not believe that receipt of a brief that is 1 day late would undermine fundamental Board interests."

While Member Schaumber agrees with those circuit courts that have taken issue with the Board's unduly harsh application of its procedural rules, see *Patrician Assisted Living*, 339 NLRB 1153 (2003), he agrees that the Board decision in *Unitec* controls the issue presented by the Charging Party's request. He noted that the new procedure suggested by the dissent was not contemplated by *Unitec* and thus must await agreement of three Board members to adopt.

(Chairman Battista and Members Liebman and Schaumber participated.)

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*J.J. Cassone Bakery, Inc.* (2-CA-32559, et al., 2-RC-22152; 345 NLRB No. 111) Portchester, NY Dec. 6, 2005. The Board set aside the administrative law judge's decision of Jan. 31, 2002, and remanded the proceeding to the chief administrative law judge for reassignment to a different administrative law judge. [HTML] [PDF]

The Respondent, in its exceptions, contended that the judge failed to conduct a careful and independent analysis of the evidence and acted improperly by extensive copying of the posthearing briefs filed by the General Counsel and the Charging Party Union, which provide virtually the entire legal analysis in his decision. The Respondent argued that the judge failed to consider or address any argument made by the Respondent in its own posthearing brief and that the judge's conduct demonstrated that it was biased against it. Therefore, the Respondent requested the Board to order a new hearing.

The Board determined that two aspects of the judge's conduct in copying the parties' posthearing briefs give the appearance of partiality. First, the extent of the judge's copying: comparison of the relevant documents revealed that the majority of the judge's decision was

copied verbatim from briefs filed by the General Counsel and the Union. Second, the judge copied verbatim from the briefs both in his factual statement and his substantive legal discussion.

The Board reasoned that the impression given is that the judge failed to conduct an independent analysis of the case's underlying facts and legal issues. In order to dispel the impression of partiality, the Board remanded the case to the chief administrative law judge for reassignment to a different judge. However, it did not order a hearing de novo because a review of the record satisfied the Board that the judge conducted the hearing impartially and in an appropriate judicial manner.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Bakery Workers Local 3 and Cabrillo Flores and Lorenzo Macua, Individuals; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New York, June 27-29, Oct. 21 and 24, Dec. 11-13 and 15, 2000, and Feb. 26-28, 2001. Adm. Law Judge Howard Edelman issued his decision Jan. 31, 2002.

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Midwest Psychological Center, Inc. (25-CA-29381, 29405; 346 NLRB No. 5) Indianapolis, IN Dec. 9, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging Yaina Williams and Hyun Kim because they concertedly complained to the Respondent regarding the wages, hours, and working conditions of the Respondent's employees and requested that employees be paid for attending mandatory meetings and compensated for the actual hours worked. [HTML] [PDF]

The Respondent excepted to the judge's finding that it is an employer subject to the Board's jurisdiction. The Board found that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

Chairman Battista agreed that the Respondent's contentions that the judge was biased in denying its motion for continuance because of a death in the family of the Respondent's president and in his questioning of the Respondent's witnesses, are without merit. He noted that the Respondent did not specifically except to the judge's denial of its motion and, therefore, the judge's decision to deny the motion is not before the Board, only the assertion that his denial of the motion is evidence of his bias. The Chairman also noted that while the judge on occasion engaged in extensive questioning of witnesses, his questioning did not give the appearance of partiality or constitute an attempt to take over the General Counsel's prosecutorial role.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Yaina Williams and Hyun Kim, Individuals; complaint alleged violation of Section 8(a)(1). Hearing at Indianapolis, June 20-21, 2005. Adm. Law Judge John H. West issued his decision Aug. 19, 2005.

River Oak Center for Children, Inc. (20-CA-31640-1; 345 NLRB No. 113) Sacramento, CA Dec. 9, 2005. The Board denied the Respondent's motion summary judgment, granted the General Counsel's motion for summary judgment, and found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the addresses and telephone numbers of unit employees, as requested in writing by Service Employees Local 535 on about Aug. 4, 2003, during negotiations for a new collective-bargaining agreement. [HTML] [PDF]

The Board found that there are no issues warranting a hearing because the Respondent has admitted all relevant factual allegations and it rejected the Respondent's arguments in support of its motion for summary judgment. The Respondent argued that it had already provided the unit employees' addresses to the Union, as required by the parties' collective-bargaining agreement, and that the Union had adequate alternative means to obtain the phone numbers; that even if the requested information was relevant, it was not required to provide the information because there were alternative methods available to the Union to obtain that information; and that because employees' addresses are subject to a contractual right of privacy and confidentiality, the unit employees' privacy rights outweigh the Union's need for the information. In addition, the Respondent argued that the California Constitution and statutes require it to keep personnel records confidential in the circumstances presented here.

The Board held that the Respondent has not shown that it has a legitimate privacy or confidentiality claim justifying its refusal to provide the requested information. It agreed with the General Counsel's contention that under extant precedent the information requested by the Union is relevant and necessary, that the Respondent has not established any affirmative defenses, and therefore that the Respondent must supply the information.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Service Employees Local 535; complaint alleged violation of Section 8(a)(1) and (5). Respondent filed motion for summary judgment April 30, 2004; General Counsel filed motion for summary judgment May 24, 2004.

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Sheet Metal Workers Local 7 (7-CC-1767; 345 NLRB No. 119) Walker, MI Dec. 6, 2005. The Board approved the administrative law judge's dismissal of the complaint allegations that the Respondent Union violated Section 8(b)(4)(ii)(B) of the Act by threatening to picket Andy J. Egan, Co., a neutral employer, in order to force Egan to stop doing business with Target Construction, Inc., with whom the Union had a labor dispute; and by picketing on a pedestrian bridge and adjacent sidewalk near the jobsite. Chairman Battista and Member Schaumber, with Member Liebman concurring in part, reversed the judge and held that the Union violated Section 8(b)(4)(ii)(B) by picketing at gate 5, which was reserved for neutral employers. [HTML] [PDF]

Chairman Battista and Member Schaumber concluded that the picketing at gate 5 violated the standards set forth in *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950), and gave rise to a presumption that the picketing had an unlawful secondary object,

which the Respondent failed to rebut. They relied on: (1) the Union's picketing at gate 5 without any reason to believe that Target was using that gate, demonstrating that the object of the picketing was not limited to the legitimate primary objective of pressuring Target to pay union scale wages and benefits; (2) the Union's claim that it was confused by the reserved gate 7 sign, which listed both Egan and Target, was undermined by Union Business Representative Doug Adams' failure to make any effort to resolve the alleged confusion before sending pickets to gate 5; (3) the pickets' refusal to leave gate 5 even after clear notice from Hunt Construction Manager William Sewall that it was a neutral gate; and (4) the judge's reliance on the alleged "short duration" of the picketing to support his conclusion that the picketing was at most a "technical violation" of *Moore Dry Dock* that "did not rise to the level of noncompliance."

Member Liebman found that the gate 5 picketing violated Section 8(b)(4)(ii)(B) for two reasons. First, she agreed with her colleagues that the judge's emphasis that the picketing was of short duration (about 50 minutes) and his characterization that the picketing was, at most, a "technical violation" of *Moore Dry Dock* that "did not rise to the level of noncompliance" had no merit. In her view, if a respondent's conduct violates the Act, the Board should find and remedy that violation.

For her second reason, Member Liebman observed that under long-established precedent, the neutral gate 5 picketing violated the *Moore Dry Dock* standards. She noted that the Respondent, having picketed at a designated neutral gate, has the burden to justify its disregard of the reserved gate system. Accordingly, the issues are whether, as the Respondent contended, confusion was created because the sign at gate 7, the primary gate, stated that it was reserved for employees of both Target and Egan, and whether that confusion justified the gate 5 picketing. Citing *NLRB v. Elevator Constructors*, 902 F.2d 1297, 1301 (8<sup>th</sup> Cir. 1990), Member Liebman concluded that Egan employees' use of gate 7 did not "taint" the reserved gate system or thereby privilege the Union to picket at gate 5, or any other designated neutral gate.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Andy J. Egan Co., Inc.; complaint alleged violation of Section 8(b)(4)(ii)(B). Hearing at Grand Rapids, May 19-20, 2003. Adm. Law Judge Ira Sandron issued his decision Sept. 10, 2003.

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### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Janitorial Environmental Services Co., Inc., Successor to A&A Maintenance (Service Employees Local 32BJ) Clifton, NJ Dec. 6, 2005. 22-CA-26839; JD(NY)-51-05, Judge Mindy E. Landow.

Consejo de Salud de la Comunidad de la Playa de Ponce, Inc. d/b/a Centro de Diagnostico y Tratamiento de la Playa-Ponce (CDT) (Steelworkers) Ponce, PR Dec. 7, 2005. 24-CA-9999, 10059; JD-83-05, Judge George Alemán.

*United Cerebral Palsy of New York City* (American Federation of Teachers Local 2) Brooklyn and New York, NY Dec. 7, 2005. 29-CA-26927; JD(NY)-50-05, Judge Howard Edelman.

Wheeling Brake Block Mfg. Co. (Food & Commercial Workers Local 379) Bridgeport, OH Dec. 9, 2005. 8-CA-34764, 35543; JD-89-05, Judge David I. Goldman.

*Plumbers Local 32* (an Individual) Seattle, WA Dec. 9, 2005. 19-CB-9181; JD(SF)-80-05, Judge Jay R. Pollack.

*Izzo Electric & Son* (Electrical Workers [IBEW] Local 99) Pawtucket, RI Dec. 9, 2005. 1-CA-41706; JD-86-05, Judge Paul Buxbaum.

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## LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

### DECISION AND CERTIFICATION OF REPRESENTATIVE

Chenega Integrated Systems, LLC, San Antonio, TX, 16-RC-10675, Dec. 9, 2005 (Chairman Battista and Member Liebman; Member Schaumber concurring in result only)

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

### DECISION AND CERTIFICATION OF REPRESENTATIVE

*Messenger Sign Co.*, Seattle, WA, 19-RC-14749, Dec. 6, 2005 (Chairman Battista and Members Liebman and Schaumber)

### DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Anne L. Sperry d/b/a Central Pacific Sprinkler Co., Sacramento, CA, 20-RD-2415,
 Dec. 7, 2005 (Chairman Battista and Members Liebman and Schaumber)
 D.S. Silvan, Inc. d/b/a Custom Air, Turlock, CA, 32-RC-5379, Dec. 8, 2005
 (Chairman Battista and Members Liebman and Schaumber)

# DECISION AND DIRECTION [that Regional Director open and count ballots ballots]

Oldcastle Glass, Inc., Cheshire, CT, 34-RC-2141, Dec. 8, 2005 (Chairman Battista and Members Liebman and Schaumber)

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Sunoco, Inc. (R.M.), Philadelphia, PA, 4-UC-413, Dec. 7, 2005 (Chairman Battista and Members Liebman and Schaumber)

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(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

*Floonics, LLC*, Richmond, VA, 5-RC-15910, Dec. 7, 2005 (Chairman Battista and Members Liebman and Schaumber)

Roy E.Hanson, Jr. Mfg., Los Angeles, CA, 21-RC-20856, Dec. 7, 2005 (Chairman Battista and Members Liebman and Schumber)

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### Miscellaneous Board Orders

ORDER [amending decision to permit the service writers and parts administrative clerk to vote by challenged ballot and denying request for review in all other respects]

Pflueger Auto Group, LLC, Honolulu, HI, 37-RC-4120, Dec. 7, 2005 (Chairman Battista and Member Liebman; Member Schaumber dissenting)

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